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IN THE

Supreme Court of The United States

October Term 1959

PETITION FOR CERTIORARI

No. 344

FIDELITY & DEPOSIT COMPANY
OF MARYLAND
Petitioner,

v.

MARY LINDSAY STUDDS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FOURTH CIRCUIT

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The Fidelity & Deposit Company of Maryland prays that a writ certiorari issue to the review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above case on May 28, 1959.

CITATIONS TO OPINIONS BELOW

The memorandum opinion of the District Court printed in the appendix hereto, infra, p. 10, is reported in 136 F. Supp. 756. The opinion of the Circuit Court of Appeals, printed in the appendix hereto, has not been published in the advance sheets of West Federal Digest at the time of the printing of this petition.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 28, 1959, infra p. 23. The jurisdiction of this Court is invoked under Title 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether an insolvent husband can cheat his creditors by entering into a colorable business arrangement with his wife wherein the insolvent husband donates his services to a business operated in the name of the wife but dependent upon the skill of the husband.

2. Whether the District Court erred in permitting an advisory jury to determine from all the surrounding facts and circumstances if the business arrangement between Colin A. Studds and his wife, Mary Lindsay Studds, was one designed for the purpose of cheating the creditors of Colin A. Studds.

STATEMENT

On September 16, 1953, Fidelity & Deposit Company of Maryland hereinafter referred to as Fidelity obtained a judgment in the United States District Court for the Eastern District of Virginia against Colin A. Studds in the amount of $22,102.47, exclusive of interest and costs. This judgment was in connection with default on a construction performance bond upon which Colin A. Studds was principal and Fidelity surety.

Thereafter, in order to satisfy its judgment against Colin Studds, Fidelity filed a complaint and amended

complaint in the United States District Court for the Eastern District of Virginia, both of which are fully set forth in the appendix to the brief for appellants below. The Fidelity alleged in brief that Colin A. Studds, its judgment debtor, was performing certain valuable services as a contractor for his wife, Mary Lindsay Studds, and this arrangement was a colorable one devised to cheat the creditors of Colin A. Studds, in particular Fidelity. Fidelity prayed for an accounting of the value of the services rendered the wife by her husband, Colin A. Studds, and asked that judgment be rendered in favor of the Fidelity for an amount not exceeding the amount owed it by Colin A. Studds. Jurisdiction in the District Court was based upon diversity of citizenship and presence of an amount in controversy exceeding $3,000 exclusive of interest and cost.

On January 28, 1955, counsel for Fidelity and counsel for Mary Lindsay Studds appeared before the United States District Judge at a pre-trial conference, and after some discussion, *both counsel agreed to submit certain questions of fact pertinent to the issue of liability to an advisory jury in accordance with Rule* 39 (c) *of the Federal Rules of Civil Procedure* (see District Court's memorandum opinion, page 11, infra) and that the matter of damages be reserved for later determination by the Special Master.

Thereafter, on September 27, 1955, pursuant to this prior agreement of counsel for Fidelity and counsel for Mary Lindsay Studds, an advisory jury was impaneled. After hearing the testimony of various witnesses including the defendant, Mary Lindsay Studds,

and her husband, Colin A. Studds, the District Judge charged the jury as set forth on pages 3, 4 and 5 of the Brief of Appellant below, asking them to determine:

> "***whether or not the business arrangement which was entered into between the defendant, Mary Lindsay Studds and her husband, Colin A. Studds, was a bona fide arrangement or whether it was entered into for the purpose of cheating and defrauding the creditors of Mr. Studd." (Court's charge to jury—Appendix of Appellant p. 19).

Thereafter the jury retired, and in due course returned a verdict in the following words:

> "Arrangement was devised to cheat the creditors of Mr. Studds and therefore colorable."

The District Court thereupon appointed a special master and referred the matter to him for an accounting relative to the value of Colin A. Studds' services to his wife, Mary Lindsay Studds, over and above the reasonable cost of maintaining their family. In due course, the U. S. District Court, upon the special master's various reports, entered up judgment on October 21, 1958, against Mary Lindsay Studds in favor of Fidelity in the amount of $10,124.44, exclusive of interest and cost.

Upon appeal, the Court below vacated and set aside the judgment in favor of Fidelity and remanded case to the District Court for entry of judgment in favor of Mary Lindsay Studds.

The Court below based its action upon its finding that the District Court erred in submitting to an advisory jury, the question as to whether the arrangement between the defendant and her husband was, in effect, devised in fraud of the rights of Fidelity and that it was an additional error to base further proceedings upon the jury's finding, appendix infra, p. 31.

REASONS FOR GRANTING THE WRIT

The decision of the Court below is in direct conflict with the rulings of the Virginia Supreme Court of Appeals in the case of *Penn v. Whitehead,* 12 Gratt 74, decided in 1855 and again before that Court in 1867 cited at 17 Gratt 503; *Catlett v. Alsop, Mosby & Co.,* 99 Va. 680, 40 SE 34, decided by the Virginia appellate court in 1901; *Atkinson v. Solenberger,* 122 Va. 667, 72 S. E. 727, decided by Virginia's highest court in 1910. The Virginia Supreme Court of Appeals' decision in *Childress v. Fidelity & Casualty Co.,* etc. 194 Va. 191, 72 S. E. (2d) 349, decided in 1952, did not reverse the Virginia Appellate Court's previous decisions supra.

It is hard to conceive that a court as astute as the Virginia Supreme Court of Appeals would reverse a basic doctrine of law such as was established in the Penn case, supra, the Catlett case, supra, and the Atkinson case, supra, without mentioning any of those cases. In this regard the Virginia Appellate Court in the recent decision of *Memorial Hospital v. Oakes, Admx.,* 200 Va. 878, (1959) a case wherein the plaintiff sought to overturn the long standing decision rela-

tive to the tort liability of a charitable hospital, made this statement at page 889:

> "No matter what the merit of the argument as an original proposition may be, for this Court now to change the rule would be 'judicial legislation' of a very invidious nature" and continuing further on the same page the Court said:
>
> > "We concede that the wisdom of the rule of immunity as applied to charitable institutions is debatable. But the doctrine which was was established in Weston's Admx. v. St. Vincent, etc., supra, is firmly embedded in the law of this Commonwealth and has become a part of the general public policy of the State. The General Assembly, though composed of many lawyers of outstanding ability throughout the years, has not seen fit to enact legislation abrogating the doctrine. By its silence, approval might well be inferred."

In light of what the Virginia Supreme Court of Appeals said in the Memorial Hospital case, supra, it is extremely unlikely that they intended in the Childress case, supra, to reverse the doctrine enunciated in the Penn case, supra; the Catlett case, supra; and in the Atkinson case, supra; a doctrine as firmly established in the field of creditors rights as the doctrine of the charitable institution is in the field of tort law. It is significant to note in the Childress case, supra, itself is found the following statement:

> ". . . whether an arrangement by which

> a wife conducts a profitable business through the agency of her insolvent husband is bona fide or colorable, and merely to cheat the husband's creditors is a question of fact to be determined by all the facts and circumstances of the particular case . . ."

In the Childress case the court did not consider the arrangement to be colorable while in the instant case the advisory jury, impaneled by the District Court with the consent of all parties litigant, and pursuant to Rule 39 (c) of the Federal Rules of Civil Procedure, determined that the arrangement between the husband and wife was a colorable one devised for the purpose of cheating the insolvent husband's creditors.

The court below has misinterpreted the law of Virginia. This will result in erroneous rulings by the various district courts in Virginia. In similar cases the ruling of the District Courts in Virginia will be contrary to the rulings in state courts. Such non-uniformity in interpretation of the state law by federal district courts and state courts of record will lead to considerable confusion and result in gross inequities. Furthermore, the ruling of the court below will open the gate and point the way to a successful method by which creditors can with impunity and even with acknowledged fraudulent intent defeat ad infinitum the just claims of their creditors.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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HUGH S. MEREDITH
Counsel for Fidelity & Deposit Co. of Md.

APPENDIX A

RULE 39 (c) FEDERAL RULES OF CIVIL PROCEDURE

"(c) ADVISORY JURY AND TRIAL BY CONSENT. In all actions not triable of right by a jury the Court upon motion or of its own initiative may try any issue with an advisory jury, or, except in actions against the United States when a statute of the United States provides for trial without a jury, the Court with the consent of both parties may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right."

APPENDIX B

MEMORANDUM OPINION OF DISTRICT COURT

Fidelity & Deposit Company of Maryland obtained a judgment against Colin A. Studds in the sum of $22,102.47, plus interest and costs, which judgment was rendered in this Court on the 16th day of September, 1953. Colin A. Studds and the defendant, Mary Lindsay Studds, were living in Wisconsin prior to 1950 where Mr. Studds was engaged in a contracting business. He failed in this business and, when he left Wisconsin for Virginia, the debt due the plaintiff was one of many remaining unpaid. Prior to entering business in Wisconsin, Studds solely maintained his home and family. While in Wisconsin, Studds provided approximately one-half of the cost of maintaining his family. Since moving to Virginia in the summer of 1950, Studds has provided nothing for the family and, according to the contention of the defendant and Studds, he has admittedly performed gratuitous services for his wife, the defendant herein, since 1950 while engaged in building numerous houses in the Virginia Beach area as agent for the wife.

Plaintiff contends that defendant, having full knowledge of the insolvency of her husband, entered into a business arrangement with him with the intent to defraud the creditors of Studds and hence the transactions were colorable. *Defendant urges that no action may be maintained to reach the value of services rendered by the husband for the wife, and that such services are gratuitous and not subject to attack by the creditors of Studds.* (Italic added)

By agreement of counsel, an advisory jury was called pursuant to Rule 39(c) of the Federal Rules of Civil Procedure. The issue submitted to the jury was as follows:

> "Was the business arrangement between Mary Lindsay Studds and Colin A. Studds, wherein Mrs. Studds conducted a business through the agency of Mr. Studds, a bona fide arrangement or one devised to cheat the creditors of Mr. Studds and therefore colorable?

On this issue the jury concluded that the arrangement was devised to cheat the creditors of Mr. Studds and colorable. The matter is now before the Court on defendant's motion to set aside the verdict of the jury.

As the fraudulent scheme between Studds and wife has been clearly proven from the evidence submitted, there are only two pertinent questions now before the Court. (Italics added)

(1) Is an action of this type maintainable in Virginia?

(2) Does the burden rest upon the defendant to show that the business arrangement was bona fide?

The alleged fraudulent gift of services took place in Virginia and the determination of these two issues are therefore dependent upon the law of this State. The case of *Penn v. Whitehead*, 12 Gratt. 74, was decided by the Court of Appeals of Virginia in 1855, and again was presented to the same court in 1867 and is cited in 17 Gratt. 503. In those cases the husband

carried on a profitable mercantile business as agent for his wife, aided by his minor sons. The factual situation is not unlike the matter now before the court. The Court, speaking through Justice Moncure, said (17 Gratt. 528):

> "A man who is without the means of paying his debts is morally bound to do all he honestly can to acquire such means, and honestly to devote all the profits of his future labor to the payment of his debts. To be sure the law cannot, or does not, compel a man, in advance, to labor for his creditors. And if he chooses to be so dishonest as to idle or give away his time, rather than labor for the means of paying his debts, the law cannot, or does not, attempt to prevent it. But if he does labor and make any profit for himself, or his wife and family, which is the same thing, his creditors may subject it to liability for the payment of their claims. Husband and wife are one in law, and he is bound, morally if not legally, to support her and the rest of his family. In laboring for them he labors, in effect, for himself. Every benefit secured to them is a benefit, incidentally, secured to himself, in exclusion of the claims of his creditor, it will not allow him, indirectly, to do the same thing, by securing such profits to his wife or family; at least *quoad* his existing creditors. A man is not apt to give away his labor, or even idle away his time. If he is not honest enough to wish to pay his debts, self-interest prompts him to do something, and to try to secure to himself and his family the profits of his skill and labor. This mo-

tive of self-interest is generally sufficient, without being assisted by legal means, to stimulate a man into action and prevent him from throwing or giving away his time, instead of trying to make a profitable use of it. And the law, instead of attempting to apply such a stimulus, contents itself with subjecting any profit he may make for himself or family to liability to the payment of his debts as aforesaid."

In 1909 the Supreme Court of Appeals of Virginia had before it the case of *Catlett, et als v. Alsop, Mosby & Co., et als*, 99 Va. 680, 40 S. E. 34, previously before the Court in *Alsop v. Catlett*, 97 Va. 364, 34 S. E. 48. The later action was on the part of creditors proceeding against the husbands and their wives to subject property acquired and profits made by the wives through the services of their husband. No reference is made in the opinion to *Penn v. Whitehead*, supra, and the Court, after discussing the separate rights of married women under the laws of Virginia, had this to say:

"There was clearly nothing illegal or improper in the action of Mrs. Catlett and Mrs. Jenkins in purchasing the stock of goods, and in conducting the business, wholly or in part, through their husbands as their agents, *unless it was done with a fraudulent intent* . . . .

"Having the right to employ her husband as her agent in the management of such trade or business, it must follow as a necessary consequence that where the legal title to the capital upon which

she is carrying on the trade or business of a merchant is in the wife, as against the husband, it cannot be subjected to the claims of the husband's creditors without proof that her title is merely colorable and fraudulent as against them."

The Court held that there was insufficient proof of fraud to subject the legal title to the stocks of goods and real estate to the payment of debts due to the creditors of the husbands. On the question of compensation for the husbands, it is said (99 Va. 687):

> "There does not seem to have been an express agreement between the husbands and wives as to the compensation the former should receive for their services. In the absence of such an agreement, the law would imply, as in case of a stranger, that they were to receive a reasonable compensation for the services rendered. This the creditors would have the right to subject to the payment of their claims, less the amount necessary for the reasonable support of the husbands and their families . . .
>
> "We are further of opinion that if the services rendered by the husbands for their wives in *the management of* their business was more than sufficient to support and maintain their families, including themselves, that excess is a debt due from their wives, and liable to their husbands' creditors; . . ."

Thereafter, in *Atkinson v. Solenberger* (1010, 1911), 112 Va. 667, 72 S.E. 727, the Supreme Court of Appeals of Virginia, after referring to *Penn v. White-*

head, supra, and *Catlett v. Alsop, Mosby & Co.*, supra, made this brief statement:

> "Where a husband renders services for his wife, whether under an express or implied agreement, his creditors have the right to subject the value of such services to the payment of their debts, less the amount necessary for the reasonable support of the husband and his family.
>
> "The fact that during the period the husband is rendering services for the wife she supports the family is no reason why, when his creditors are seeking to charge her with the value of his services, she should not be permitted to set off what she has advanced for the reasonable necessary support of the husband and his family during the period she is charged with the value of his services. If the husband himself, under like circumstances, were to sue his wife to recover the value of his services, it is clear that he could only recover from her the value of his earnings or wages in excess of a reasonable support for himself and firmly. The creditors are entitled to no more."

Thus it appears that the law in Virginia is well settled that the existing creditors of an insolvent husband may subject the value of his services rendered to his wife to the payment of claims, less the amount necessary for the reasonable support of the husband and his family, with the right of the wife to set off such amounts advanced, if any, for the reasonably necessary support of the husband and his family. Was the law modified in *Childress v. Fidelity & Casualty*

Co., etc., 194 Va. 191, 72 S.E. (2nd) 349 (decided 1952) and, if so, to what extent?

The opinion in *Childress v. Fidelity, etc.*, supra, makes no mention of *Penn v. Whitehead* and *Catlett v. Alsop, Mosby & Co.*, both supra. It will be noted that, in *Childress*, the creditors sought to subject a tract of land acquired by the wife under the theory that title was taken in the wife's name with intent to defraud the creditor. In approaching the question of services rendered by the husband to the wife, thus increasing the property holdings of the wife, it is noted:

> "Here the evidence establishes that the insolvent husband donated his services to his wife by managing and conducting her business while his creditor remained unpaid. This is a practice not lending itself to commendation. Yet the gift by the husband is not unlawful, and of itself, it is insufficient to convict the wife of fraud. Acquisition by her of property with funds derived from her business so gratuitously conducted by her husband as her agent may not, *on that ground alone*, be set aside by his creditors."

Then follow quotations from American Law Reports and Michie's Jurisprudence, where it is stated:

> "Since his creditors have no lien on his labor or any way to compel him to work, a debtor may legally give his entire time, skill and industry to his wife, in aiding to carry on a business owned by her, and his creditors cannot complain of his doing so, since such a donation of services is not inconsistent with his obligations towards them. 28 *A.L.R.* 1046, 1048.

"Husband conducts business as agent for wife: *Whether an arrangement by which a wife conducts a profitable business through the agency of her insolvent husband is bona fide or colorable, and merely to cheat the husband's creditors is a question of fact to be determined by all the facts and circumstances of the particular case.* The fact that the wife has neither experience nor a separate estate at the time she purchases goods on credit and begins a business which is conducted solely and exclusively by her insolvent husband as her agent, is a circumstance to be considered in connection with other evidence in determining the bona fides of the wife, but is not alone sufficient to charge the wife with fraud. 9. *Michie's Jurisprudence, Fraudulent and Voluntary Conveyances,* §26, p. 39."

It is the opinion of this Court that *Childress,* supra, made no radical departure from the prior Virginia decisions. It may have modified, to some extent, the language of Justice Moncure in *Penn v. Whitehead,* supra, but the general tenor of *Childress,* when read in conjunction with the other authorities, is to the effect that if the business arrangement between husband and wife was one essentially planned and operated for the purpose of cheating the husband's creditors, then the wife must respond to the extent of the value of the husband's services, less the amount necessary for the reasonable support of the husband and his family during the period of the rendition of such services.

It is true that a debtor's labor is not generally an asset for creditors until the hire-money is actually received by him. *Glenn on The Law of Fradulent Conveyances*, §139, 140, pp. 190, 191. This rule is subject to the proviso, however, that the employment transaction is bona fide and not merely a scheme fraudulently designed for the purpose of defeating creditors of the laboring party. To hold otherwise would open an avenue of fraud and constitute an invitation to all parties similarly inclined. The annotation appearing in 28 *A.L.R.* 1046, et seq., apparently recognizes this distinction and, if not, Virginia falls within a minority rule as *Penn v. Whitehead* and *Catlett v. Alsop*, both supra, are referred to in the same annotation (p. 1060) under the caption entitled "*Cases Denying Validity of Gift.*" The rule is also set forth in 37 *C.J.S.*, "*Fraudulent Conveyances*," §16 (b), p. 861, 862:

> "If a husband donates his services to his wife, in working for her in a business owned and conducted by her as her separate property, or as her agent in executing a contract made by her with a third person, or, *a fortiori*, where the husband is employed by the wife on a salary, it is held that the husband's creditors cannot *by reason of such donation of his services or employment* reach and subject the property or claims thereby acquired by the wife, and this principle applies however valuable may be the services of the husband, and although he is insolvent.
>
> "For the principle to apply, it must appear that the business is actually the wife's and not a device to keep from the husband's creditors the

profits and income of a business which is really his own. The principle has no application where a husband, for the purpose of defrauding his creditors, does business in his wife's name but for his own benefit, and an insolvent debtor cannot defeat creditors by simply transferring his property to his wife and managing it for her as her agent."

In the instant case Mrs. Studds acquired title to real estate in her name, but the business of constructing the residence thereon, while ostensibly in the name of the wife, was, as the jury concluded, merely a scheme to defraud the creditors of Mr. Studds. The rule in Virginia and in West Virginia (1) under such facts is that where there are profits over and above the support of the debtor and his wife and family, a court of equity may justly apportion such profits between his wife and his existing creditors.

Despite the refusal of defendant to submit any requested change to the jury, the Court took the precaution of advising the jury (1) with respect to the rights of married women in Virginia, (2) that the fact of the marriage is not in itself a badge of fraud, (3) that Studds had a legal right to donate his services to his wife, and to manage and conduct her business while his creditors remained unpaid, and (4) that the gift of services is not in and of itself unlawful, nor is it sufficient to convict Mrs. Studds of fraud.

The sole remaining question for determination deals with the question of burden of proof. On this point the Court charged the jury:

> "May I say to you that the only basic principles that should guide you perhaps is the fact that a gift between an insolvent husband and his wife is presumed to be for the purpose of delaying and hindering the husband's creditors, and thus it is in this case . . . the burden is on Mrs. Studds to show by clear and convincing evidence that the gift was in fact a bona fide gift rather than an arrangement made for the purpose of cheating the creditors."

Section 55-81 of the Code of Virginia, 1950, provides:

> "Every gift, conveyance, assignment, transfer or charge which is not upon consideration deemed valuable in law, or which is upon consideration of marriage, shall be void as to creditors whose debts shall have been contracted at the time it was made, but shall not, on that account merely, be void as to creditors whose debts shall have been contracted or as to purchasers who shall have purchased after it was made; and though it be decreed to be void as to a prior creditor, because voluntary or upon consideration of marriage, it shall not, for that cause, be decreed to be void as to subsequent creditors or purchasers."

While the word "void" has been construed to mean "voidable" (2), it is perfectly apparent that an arrangement for gratuitous services in the form of a

gift by the husband to the wife falls within the intent of

(1) *Boggess v. Richars,* 39 W. Va. 567, 20 S.E. 599, 45 Am. St. Rep. 938, 26 L.R.A. 537.

(2) *Norris & Co. v. Jones,* 93 Va. 176, 24 S.E. 911, the statute. *Penn v. Whitehead,* supra (17 Gratt, at p. 527). The word "gift" was defined in *Logan v. Glass,* 136 Pa. Sup. 221, 7 A. (2d) 116, 118, as "primarily some performance or right which is not paid for by the third person and which is apparently designed to benefit him." Generally the rule is applied to transfer of tangible property from the husband to the wife in which event public policy dictates that the transactions are presumed to be fraudulent with the burden on the wife to prove the good faith of the transaction by clear and satisfactory evidence. *Morrisette v. Cook,* 122 Va. 588, 592, 95 S. E. 449. There appears to be no sound reason why the same burden should not be imposed upon the wife with respect to a gift of services from an insolvent husband. There is ample authority supporting the view that a man's labor, or right to labor, is "property," and the right to enter into contracts of employment, or to terminate such contracts is similarly regarded. 72 *C.J.S., "Property,"* §2, p. 151.

Defendant's motion to set aside the verdict of the jury is denied. The verdict of the jury is accepted by th Court, and this cause will be referred to a Special Master for the determination of damages in accordance with the formula and views expressed herein.

(SGD) WALTER E. HOFFMAN
United States District Judge

Norfolk, Virginia
January 13, 1956

SUPPLEMENTAL MEMORANDUM

In the original memorandum filed herein on January 13, 1956, the Court referred to a quotation from a West Virginia case and stated (last line of page 6 and first four lines of page 7):

> "The rule in Virginia and in West Virginia: (1) under such facts is that where there are profits over and above the support of the debtor and his wife and family, a court of equity may justly apportion such profits between his wife and his existing creditors."

The memorandum is modified to eliminate the quoted language. Whatever may be the law in West Virginia, the law in Virginia appears to establish a formula as set forth in *Catlett v. Alsop* and *Atkinson v. Solenberger*. The question of "profit" would be immaterial as the obligation of the wife, if any, is drawn from an express or implied agreement on the part of the wife to pay for the reasonable value of the husband's services, less the amount necessary for the reasonable support of the husband and his family. *Penn v. Whitehead* suggests that "profit" is a factor to be considered, but this case is obviously modified by the subsequent authorities.

(SGD) WALTER E. HOFFMAN
United States District Judge

Norfolk, Virginia
January 23, 1956

OPINION OF CIRCUIT COURT OF APPEALS

BOREMAN, District Judge:

The Fidelity and Deposit Company of Maryland, plaintiff below, obtained a judgment against Mary Lindsay Studds, defendant below, hence this appeal. The parties will be hereinafter referred to, respectively, as plaintiff and defendant.

Colin A. Studds and the defendant, now residents of Virginia, formerly resided in Wisconsin where Mr. Studds was engaged in a building contracting business. This business failed and when he and the defendant left Wisconsin for Virginia, a debt of $22,102.47 due the plaintiff remained unpaid. The plaintiff thereafter obtained a judgment for the amount of the debt against Colin A. Studds.

Subsequently, in an effort to collect its judgment against defendant's husband, Colin A. Studds, plaintiff, instituted the present action against the defendant. The complaint, as amended, alleged: That the defendant is the legal wife of Colin A. Studds; that Colin A. Studds is legally indebted to the plaintiff in the amount of $22,102.47, as evidenced by the aforementioned judgment; that Colin A. Studds had, for a period of about five years prior to the institution of the present action, been in the sole employment of the defendant; that during this period, although Colin A. Studds rendered numerous valuable services to the defendant in her business, he received no pecuniary remuneration for his services; that Colin A. Studds, during the entire period

when working for the defendant, was insolvent; and that the arrangement by which the husband worked for his wife, the defendant, had as its purpose an intent to defraud the creditors of the husband. By agreement of counsel, an advisory jury was called and the issue submitted to the jury was stated by the trial court as follows:

> "Was the business arrangement between Mary Lindsay Studds and Colin A. Studds, wherein Mrs. Studds conducted a business through the agency of Mr. Studds, a bona fide arrangement or one devised to cheat the creditors of Mr. Studds and therefore colorable?"

On this issue the jury concluded that the arrangement was devised to cheat the creditors of Mr. Studds and colorable.

The defendant moved that the verdict of the jury be set aside on the ground that there was no evidence before the jury on which the verdict could be predicated and that the issue, as framed by the Court, should not have been presented to the jury. The Court overruled the defendant's motion and, after twice submitting the case to a Special Master to determine the amount of damages, rendered final judgment for the plaintiff in the amount of $10,125.14. On this appeal the defendant contends that, even though the facts alleged and proved to the satisfaction of the jury be true, there exists no such cause of action in the State of Virginia. Both parties have appealed on the question of the proper amount of damages.

The evidence disclosed that the defendant had her

separate income from a trust fund amounting to approximately $20,000.00 a year; that while in Wisconsin, Colin A. Studds provided approximately one-half of the cost of maintaining his wife and family; that since moving to Virginia in the summer of 1950, Colin A. Studds has provided nothing for the family and has performed gratuitous services for the defendant since 1950 while engaged in building numerous houses in the Virginia Beach area as agent for the defendant.

At the outset, it is interestingly significant to note that the complaint does not allege that the capital with which the building business in question was commenced and continued was *not* the actual and bona fide separate estate of the defendant. Neither is there any allegation that the business in question was successful and accumulated profits. The main question presented for determination is whether, on the basis of the allegations, a valid cause of action exists in Virginia.

Before attempting to analyze and apply the law of Virginia, it is discovered that the great weight of authority, in many other jurisdictions, approves the principle that a debtor, even though insolvent, has committed no fraud in law or in fact by giving his labor away, for by so doing he has not concealed, withheld or disposed of anything on which his creditors have any claim in law or in equity; and, generally, this rule applies with equal force although the relationship of the debtor and his employer is that of husband and wife. Annot. 28 A. L. R. 1046 (1924). See also 37 C.J.S., Fraudulent Conveyances, §16(b) (1943).

By virtue of certain early decisions, Virginia has,

until recently, adhered to a decidedly minority view. The first such decision was in the case of *Penn v. Whitehead*, 12 Gratt. 74 (1855), in which the husband's creditors were allowed to subject to liability, in a situation similar to the one here in issue, the property which the business had accumulated through its profitable operations. The liability there sought and imposed was *in rem*, or special, in nature, against the accumulated property which was the subject matter of the suit, and not *in personam* against the wife or her general credit. The Penn case was before the Supreme Court of Virginia a second time in 1867, reported at 17 Gratt. 503. At that time it was unequivocally held that in order for the creditors of the husband to claim the value of his services, it must be shown that there were profits, after the payment of all the business debts, from which the husband's services could be compensated.

The next Virginia decision touching on this question was the case of *Catlett v. Alsop, Mosby & Co.*, 99 Va. 680, 45 S. E. 34 (1901). This also was an action against the wife to subject the *profits* made by the husband-debtor *for* his wife to the payment of the husband's debts. On the authority of the *Penn v. Whitehead* cases, the Virginia court again allowed recovery.

It is clear to this Court that neither the two *Penn v. Whitehead* cases nor the *Catlett* case are acceptable authority upon which the plaintiff here could be permitted to recover. The all-important distinction is that here the recovery is sought against the wife's general credit with no allegation, and certainly with no proof, that the business operated by Colin A. Studds for the defendant accumulated any profits.

Subsequently, the Supreme Court of Virginia decided the case of *Atkinson v. Solenberger*, 112 Va. 667, 72 S. E. 727 (1910). At first glance, this decision, this decision appears to have unwittingly extended or enlarged the rule as adopted in the prior cases wherein the Court said:

> "Where a husband renders services for his wife, whether under an express or implied agreement, his creditors have the right to subject the value of such services to the payment of their debts, less the amount necessary for the reasonable support of the husband and his family. See *Catlett v. Alsop, Mosby & Co.*, 99 Va. 680, 687, 40 S. E. 34; *Penn v. Whitehead*, 17 Grat. 503, 525, 94 Am. Dec. 478; id. 12 Grat. 74, 80."

However, a searching examination of the entire decision discloses that the Atkinson case simply holds that, under such circumstances, the wife must be allowed a deduction of the amount necessary for the reasonable support of the family. The appellant in the Atkinson case was the party seeking to recover the value of the husband's services and the only assignment of error, pertinent to the instant case, was as to the allowance of the deduction for support. The question as to whether the wife can be subjected to liability *generally* for the value of her husband's services, in the absence of a showing that profits were created by the services so rendered, was neither presented to nor decided by the court. In fact, it is impossible to determine from the reported Atkinson decision whether the purpose of the litigation was to subject to liability the general credit of the wife or merely the profits created by the husband's services.

Therefore, we find the Atkinson case neither pertinent nor helpful in providing an answer to our present inquiry.

As previously noted, although the early Virginia cases of *Penn v. Whitehead* and *Catlett v. Alsop, Mosby & Co.* deviated to some extent from the general view, those cases are significantly distinguishable from the one here to be decided. However, we are of the opinion that Virginia has adopted the majority view and that Penn and Catlett cases have been impliedly overruled by a more recent decision in the case of *Childress v. Fidelity & Casualty Co. of New York*, 194 Va. 191, 72 S. E. 2d 349 (1952). In the Childress case, two separate questions were presented: One ground, upon which recovery was sought therein, was based on the contention by the creditor that the wife's land was not really hers, but had been transferred to her voluntarily by her husband through a fraudulent scheme to remove the property beyond the claims of her husband's creditors; that it was hers in name only and that the husband was, in reality, operating his own business under a colorable arrangement. Although recognizing that such a device, if properly proved, would be a valid basis for recovery, the court held this contention to be unsupported by the evidence. The second and more important holding of the Childress case concerns the contention by the husband's creditor that the *land*, which had been purchased with the *profits* of the enterprise, could be subjected to the claims of the creditor for the reasonable value of the husband's gratuitous services. This was substantially the same question presented and decided in the Penn and Catlett cases. Without any reference whatsoever to

the Penn and Catlett or the Atkinson cases, the court held that since the land and its profits were traceable to the wife's original purchase and *her* business enterprise, there could be no recovery on this second theory, thus clearly, by implication, overruling all the prior Virginia decisions and aligning Virginia with the generally accepted majority view.

In the Childress case, the Supreme Court of Virginia quoted with approval the following language from Annot. 28 A. L. R. 1046, 1048 (1924):

> "Since his creditors have no lien on his labor or any way to compel him to work, a debtor may legally give his entire time, skill and industry to his wife, in aiding to carry on a business owned by her, and his creditors cannot complain of his doing so, since such a donation of services is not inconsistent with his obligations towards them."

A summary of the majority view in 37 C. J. S., Fraudulent Conveyances, §16(b) (1943), appears to perfectly express what we believe to be the holding of the Childress case as follows:

> "A husband may donate his services to his wife in her separate business without rendering the property or claim thereby acquired by her subject to his creditors' claims; but the principle applies only if the business is actually the wife's and not a device to keep from his creditors the income of a business which is actually his own business."

The court in the Childress case, in stating that fraud is a question of fact to be determined by all the facts and circumstances of the particular case, was deal-

ing with the question of whether the *original transfer* of the property or business to the wife was bona fide or merely to cheat the husband's creditors and thus colorable. The intent with which the husband donates his services voluntarily to his wife and the intent with which the wife accepts such services is immaterial. That this was the conception of the law by the Virginia Court in the Childress case is shown by the following language, 194 Va. at page , 72 S. E. 2d, at page 354:

> "The documentary and other evidence clearly proves that the sawmill was in the first instance purchased and owned by Kelsey T. Childress (the wife). When operated by her husband, he did so as her agent and manager and not on his own account. The profits derived belonged to her and not to him. These funds were used by her to purchase the 138 acres of land which enhanced in value, and from the manufacture of the timber thereon, considerable profits were made. Profit was also made by the sale of a valuable parcel aof this tract to C. H. Reagan. This land, its enhanced worth, and the profits thus derived, are, however, traceable to and are the result of her original purchase and her business enterprise, and not her husband's.
>
> "Is does not appear that the conveyance by Zack Justice to Kelsey T. Childress was in fraud of Fidelity's rights. The land was paid for by her, and neither it nor the funds now on deposit with the court are subject to the judgment held against her husband."

Applying our interpretation of the law of Virginia,

we reach the conclusion that it was error to submit to the jury, for determination, the question as to whether the arrangement between the defendant and her husband was, in effect, devised in fraud of the rights of the plaintiff. It was additional error to base further proceedings upon the jury's finding. Therefore, it is unnecessary to consider the remaining questions raised on appeal as to the proper amount of damages.

The judgment in favor of the plaintiff will be vacated and set aside and the case remanded so that judgment may be entered for the defendant.

Reversed and remanded.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1959

No. 344

FIDELITY & DEPOSIT COMPANY OF MARYLAND

Petitioner

v.

MARY LINDSAY STUDDS

Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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THE RELIANCE PRESS OF NORFOLK, VA., INC.

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QUESTIONS PRESENTED

The basic issue before the United States Court of Appeals for the Fourth Circut was whether a debtor may legally give his time, skill and industry to his wife, in aiding her to carry on a business owned by her, without accountability to the creditors of the husband under the Virginia statutes relating to fraudulent and voluntary conveyances. As stated in the *Petition*, this question is presented in the form of a rhetorical question, it being assumed that such a donation *cheats* the husband's creditors.

The second question as stated in the *Petition* is incidental to the first. It arose in the District Court under circumstances which will be discussed later in this brief.

STATEMENT

The statement in the *Petition*, (pp. 2-4) fails to present the facts in such a manner as to show the question sought to be reviewed. Accordingly, we re-state them here.

The Respondent is a woman of means, all of which she inherited, and no part of which was derived from her husband. The larger part of her fortune is held in trust by a Milwaukee bank and from these trust funds she derives an income of $20,000.00 per year. At the time of, or shortly prior to, his marriage with Respondent, Colin A. Studds was a Sergeant in the United States Regular Army, stationed in Hawaii. Following his marriage he returned with his wife to her home in Milwaukee and there engaged in the construction business. This enterprise was not successful, and while he never filed a petition in bankruptcy, nor had one filed against him, he was forced to go out of business by reason of insolvency. As a result of the collapse of this venture the wife was required to pay a $10,000.00 note which she had endorsed to supply him with capital for his business, and it was out of this venture that the indebtedness to the Petitioner arose.

In 1950, Studds and his wife, together with their small daughter, moved to the State of Virginia, and shortly afterwards the wife purchased a home for the family at a cost of $35,000.00. Since moving to Virginia

the parties have lived on a scale in excess of $12,000.00 per year, all of which was supplied by the wife.

In the latter part of 1950, or the early part of 1951, the wife, with funds belonging wholly to her, embarked on a project of building a number of dwellings at Virginia Beach, proposing to sell them, when completed, for profit. She was assisted in the venture by her husband who made no contribution to capital. All of the houses were sold, except three which remained unsold at the time of the institution of this action. The venture was not a continuing one, however, and no additional houses have been constructed.

The action in the District Court was not a proceeding *in rem* to subject specific property, and no effort was made to reach the fruits of the enterprise. It was neither alleged, nor proved, that any profit resulted from the venture. The action was solely *in personam*, and sought to recover the value of services as such rendered the wife by the husband.

The cause was referred by the District Court to a Special Master, who, in a highly artificial manner, and without regard to any facts adduced before him, reached the conclusion that the value of the husband's services over a three-year period amounted to more than $36,000.00. This conclusion was based on the fact that the overall cost of construction was approximately $360,000.00, that no general contractor was involved, that the services performed by the husband were those customarily performed by general contractors, that general contractors customarily charged 10% of the cost of construction, and on this basis he concluded that the value of the husband's services rendered the wife was $36,000.00. The District Court approved and confirmed this conclusion.

It was conceded by all that the question whether or not the husband could lawfully donate his services to the wife was controlled by Virginia law, although the District Court seemed to lose sight of the fact that in addition to the statute relating to fraudulent transfers there is a second, related statute, which permits creditors to reach property *voluntarily* transferred by debtors.

The District Court reached the conclusion that a husband could lawfully donate his services to his wife, *provided he did so in good faith and not with intent to defraud his creditors.* For the purpose of determining whether or not the donation was made in good faith, the District Court impaneled an advisory jury. There was a statement in the opinion of the District Court, repeated in the opinion of the Court of Appeals, to the effect that counsel for Mrs. Studds agreed to submit this question to the jury. However, the record discloses repeated objections by counsel for Mrs. Studds, prior to impaneling the jury, and after the jury's verdict had been returned, based on the contention that it was improper to submit such an issue to the jury. There is some indication in the *Petition* (see italicized language on Page 3) that the supposed "agreement" of counsel has some significance. However, while mentioning this fact, neither the District Court, nor the Court of Appeals, took any action predicated thereon.

The District Court submitted the issue to the jury in these words:

> "THE COURT: Gentlemen of the jury: The issue presented to you is a very narrow one and, as I have told you, it is in the form of a special verdict for you to determine whether or not the

business arrangement which was entered into between the defendant, Mary Lindsay Studds, and her husband, Colin A. Studds, was a *bona fide* arrangement or whether it was entered into for the purpose of cheating and defrauding the creditors of Mr. Studds."

The District Court instructed the jury as follows:

"And I say to you, as I said to you on Friday I believe during the course of this trial, that it is contended in this case that Mr. Studds, who admittedly was insolvent at the time he left Wisconsin, had a legal right to donate his services to his wife. He had a legal right to manage and conduct her business while his creditor remained unpaid. That is true no matter how much you may condemn such a practice. In other words, a gift of the services by the husband to the wife is not unlawful in and of itself, nor is it sufficient in and of itself to convict Mrs. Studds of fraud. The fact that she may have acquired and accumulated property by reason of the work performed by Mr. Studds is not in and of itself any ground for saying that the transaction was in essence fraudulent for the purpose of avoiding the creditors."

The jury returned its verdict in these words:

"Arrangement was devised to cheat the creditors of Mr. Studds and therefore colorable."

The District Court permitted certain offsets against the gross finding of $36,000.00 as the value of the husband's services, and rendered judgment against the respondent for $10,924.44, exclusive of interest and costs. On appeal the United States Court of Appeals for the Fourth Circuit reversed the judgment on the authority of *Childress v. The Fidelity and Casualty Company of New York*, 194 Va. 191, 72 S. E. 2d, 349, 35 A. L. R. 2d, 1.

ARGUMENT

The right of action asserted by the petitioner arises, if at all, under the Virginia statutes, commonly known as the Statute of Fraudulent Conveyances. They have their origin in the English Statute of 13th Elizabeth. Their origin and history is succintly stated in 3 Pomeroy's Equity Jurisprudence, Fifth Edition, Section 968, as follows:

> "SEC. 968. CONVEYANCES IN FRAUD OF CREDITORS—Dealings by a person with his property with intent to defraud his creditors were voidable at the common law; but the existing rules on the subject both in England and in this country are founded upon statute. The operative statute in England, which is also the basis of all legislation and judicial decision in the United States, is the celebrated act 13 Eliz., c. 5. It enacts that all conveyances, etc., of any land, goods, or chattels, had or made of purpose to delay or defraud creditors and others of their actions or debts, shall be taken only as against such persons and their representatives as shall or might be so delayed or defrauded, to be utterly void; provided that the act shall not extend to any conveyance or assurance made on good consideration and *bona fide* to a person not having notice of such fraud."

The latest decision of the Supreme Court of Appeals of Virginia, construing the Statute of Fraudulent Conveyances with relation to the question in issue is *Childress v. The Fidelity and Castualty Company of New York, supra*, 194 Va. 191, 72 S. E. 2d, 349, 35 A. L. R. 2d, 1, and it is in the interpretation of this case, it is respectfully submitted, that the District Court erred. This was a suit, in the language of the opinion in that case, "to subject a tract of land of 138

acres, conveyed by Zach Justice to Kelsey T. Childress on October 17, 1946, to payment of a judgment for $2,000., with interest, theretofore obtained by Fidelity against Andy G. Childress. It is claimed that the consideration paid for the land belonged to Andy G. Childress who was insolvent and that title was taken in his wife's name with intent on their part to defraud Fidelity, and the conveyance is thus voidable."

It will be observed that, unlike the form of action in the instant case, the suit was *in rem* to subject real estate claimed to belong to the husband, although title was in the wife's name. The action in the instant case is *in personam*, and seeks to charge the wife with the value of the husband's labor, with no allegation and no proof that the wife has been thereby benefitted.

We quote at length from the opinion in the *Childress* case, since we deem that necessary in order to demonstrate the principles decided and the facts upon which they were based. From the opinion, beginning on page 195:

> "As a whole the evidence rather clearly shows that prior to 1946 Kelsey T. Childress had from time to time been engaged in various business activities. During this period she had accumulated some $800 or more, and sometime prior to April 16, 1946, she used that money to make an initial payment on a sawmill which she had decided to purchase and operate. What other funds, if any, were needed to make this purchase, and if so, by whom furnished, does not appear from the evidence. Upon acquisition of this mill, it was moved by her husband from its then location to a site near the forks of Big Prater Creek in Buchanan County. On April 16, 1946, after having made location of the mill, she formed a partnership with

Auty Coleman and G. B. Coleman, and the three entered into a written agreement of partnership and began operation of the sawmill.

"The partnership agreement which is filed in evidence provided, among other things, that each partner was to contribute the sum of $2500 to the enterprise, and the business was to be conducted under the name of Big Prater Lumber Company. The mill and a truck that Kelsey T. Childress owned were put in by her as capital, but it does not definitely appear whether the mill and truck made up the full $2500 that she was to contribute. Operation of this mill by the three partners was successful and profits were realized by the owners. The fact that these three parties, Kelsey T. Childress, Auty Coleman and G. B. Coleman, made up the partnership is shown by the written agreement and by the testimony of the Childresses and Auty Coleman. Yet the letter also said that he and G. B. Coleman negotiated with Andy G. Childress for purchase of their interests in the business, and from some of his testimony it could be inferred that he considered Andy G. Childress to be then interested in the mill as part owner.

"When operation of the mill was begun, it was agreed between all interested parties that Andy G. Childress was to represent his wife and be manager of the mill, keep the books, and as manager sign all checks for the partnership; G. B. Coleman was to supervise cutting of the timber; and Auty Coleman was to be in charge of the trucks and move the cut logs to the mill.

"By written contract of September 26, 1946, (filed as an exhibit), Auty and G. B. Coleman sold their entire interest in the Big Prater Lumber Company to Kelsey T. Childress. The exact consideration paid to the Colemans is not made evident, but it appears that they received two-thirds of the

profits during the time that they were partners in the enterprise and a further consideration when they sold out their interests.

"After the shares of the Colemans had been acquired, Kelsey T. Childress and her husband continued to operate the business. Though he conducted the business, the evidence fails to disclose that any funds belonging to him were used to purchase the sawmill when first acquired or that any of his funds were thereafter invested in the enterprise. His services, however, were given without charge to his wife, and he received no salary but was allowed to draw on the mill funds for himself at times and when necessary. In short, he drew no fixed or recognized salary, but he and his wife said that he obtained a living from the business by working for her.

"Before the interest of the Colemans in the mill was acquired by Kelsey T. Childress, she decided to contact Zach Justice about the tract of timberland which he ultimately conveyed to her and which is the chief subject matter of this litigation. She first went to see him about purchasing that property and talked with him at length about the matter. At a somewhat later date, and after she had acquired the Coleman interests, she and her husband conferred with Justice, and on other occasions Andy G. Childress discussed the prospective purchase of the land with him. The purchase price was $5000, of which a $2000 cash payment was required, and the balance of $3000 was to be paid on time. The sum of $1500 was borrowed from one Bayless Callahan on a ninety-day note executed by Kelsey Childress and Andy G. Childress. That sum, along with $500 which the defendants say was obtained from sale of lumber, etc., from the mill when owned by Kelsey T. Childress and the Colemans, was used by her to make the cash payment.

"The $2000 was paid to Justice, and on October 17, 1946, two notes in the respective sums of $1000 and $2000, with interest, and payable at six and twelve months after date, were executed by Kelsey T. Childress and delivered to Zach Justice. They evidenced the deferred part of the purchase price. On that date a deed was also executed and delivered by Zach Justice conveying the tract of land to Kelsey T. Childress. These two notes, along with the $1500 borrowed from Callahan, were later paid out of the profits made from the mill.

"The deed to Kelsey T. Childress was not recorded until November 9, 1948 which was a day after a deed was executed by Kelsey T. Childress and her husband conveying a part of this tract of land to C. H. Reagan, which deed was likewise recorded November 9, 1948. It was the recordation of these instruments which apprised Fidelity of the fact that this tract of land had been acquired by Kelsey T. Childress.

"Other testimony shows that for some years immediately previous to the time that Kelsey T. Childress first acquired the sawmill which was operated by her and the two Colemans, with Andy G. Childress acting as her manager, he, Childress, had been gainfully employed. He had served in the merchant marine and over periods of time worked for several different employers and had on occasions earned as much as $500 a month. It is contended that from these circumstances it should be inferred that his funds went into the purchase of the mill and land. But no funds earned or saved by him are traced or shown to have been used to pay for either the mill or the land.

"In these decisions the effect of the Married Woman's Act, Acts 1899-1900, ch. 1139, p. 1240, (as amended, section 55-35, et seq., Code of 1950)

was considered and discussed. That legislation as enacted and as it now appears reads in part:

"'A married woman shall have the right to acquire, hold, use, control and dispose of property as if she were unmarried***', section 55-35, and 'A married woman may contract and be contracted with, sue and be sued in the same manner and with the same consequences as if she were unmarried ***,' section 55-36.

"And though the conveyance was made by a third party to the wife, it was held in Johnson v. Ables, supra, that because of the relation of husband and wife, an inference of fact arose that the consideration was furnished by the insolvent husband, and the conveyance to his wife was thus presumptively voluntary and in fraud of his creditors and cast the burden upon her to prove clearly that she in fact furnished the consideration.

"We need not and do not approve or disapprove the principle, as thus applied. We are content to say that it is universally known that married women have for some years engaged freely in the purchase and sale of real estate and all other kinds of property. They now conduct business enterprises of almost every nature in which acquisition and disposal of property is required, and the *bona fides* of these transactions must be determined by the facts of each case.

"Here the evidence establishes that the insolvent husband donated his services to his wife by managing and conducting her business while his creditor remained unpaid. That is a practice not lending itself to commendation. Yet the gift by the husband is not unlawful, and of itself, it is insufficient to convict the wife of fraud. Acquisition by her of property with funds derived from her business so gratuitously conducted by her hus-

band as her agent may not, on that ground alone, be set aside by his creditors.

"'Since his creditors have no lien on his labor or any way to compel him to work, a debtor may legally give his entire time, skill and industry to his wife, in aiding to carry on a business owned by her, and his creditors cannot complain of his doing so, since such a donation of services is not inconsistent with his obligations towards them.' 28 A. L. R. 1046, 1048.

"'Husband conducts business as agent for wife: Whether an arrangement by which a wife conducts a profitable business through the agency of her insolvent husband is bona fide or colorable, and merely to cheat the husband's creditors is a question of fact to be determined by all the facts and circumstances of the particular case. The fact that the wife has neither experience nor a separate estate at the time she purchases goods on credit and begins a business, which is conducted solely and exclusively by her insolvent husband as her agent, is a circumstance to be considered in connection with other evidence in determining the bona fides of the wife, but is not alone sufficient to charge the wife with fraud.' 9 Michie's Jurisprudence, Fraudulent and Voluntary Conveyances, sec. 26, p. 39.

"Relationship is not a badge of fraud. There is no law which forbids persons standing in near relations of consanguinity, affinity, or business, from dealing with each other, or which requires them to conduct their business with each other differently from the manner in which they conduct it with other persons. But as fraud is generally accompanied by a secret trust, the debtor usually selects some person in whom he can repose secret confidence. And as this trust and confidence is more likely to exist between relatives, or those who

occupy confidential relations, their transactions with each other, when fraud is charged, will be more closely scrutinized.' Johnson v. Lucas, 103 Va. 36, 40, 48 S. E. 497.

"The documentary and other evidence clearly proves that the sawmill was in the first instance purchased and owned by Kelsey T. Childress. When operated by her husband, he did so as her agent and manager and not on his own account. The profits derived belonged to her and not to him. These funds were used by her to purchase the 138 acres of land which enhanced in value, and from the manufacture of the timber thereon, considerable profits were made. Profit was also made by the sale of a valuable parcel of this tract to C. H. Reagan. This land, its enhanced worth, and the profits thus derived, are, however, traceable to and are the result of her original purchase, and her business enterprise, and not her husband's.

"It does not appear that the conveyance by Zach Justice to Kelsey T. Childress was in fraud of Fidelity's rights. The land was paid for by her, and neither it nor the funds now on deposit with the court are subject to the judgment held against her husband."

It would serve no useful purpose to discuss what was decided in prior Virginia cases. The decision of the Supreme Court of Appeals of Virginia in *Childress v. The Fidelity and Casualty Company of New York*, *supra*, directly in point as it is, must be accepted in the interpretation of the Sections of the Virginia Code dealing with fraudulent and voluntary conveyances. In the *Childress* case the husband's creditor sought to charge specific property, which was purchased in the name of the wife from the proceeds of a business conducted by the husband in the wife's name. It was con-

ceded that the husband was sole operator of the business, and drew out funds upon which he lived at will. Nevertheless the Court held (reversing the lower court) that the husband had a right to donate his services to the wife, the sole inquiry being whether or not the capital of the business was contributed altogether by the wife, or whether the husband had himself contributued capital.

The District Court, interpreting the *Childress* case, in its memorandum opinion filed January 13, 1955, reached the conclusion that this case "made no radical departure from the prior Virginia decisions", stating further that "it may have modified, to some extent, the language of Justice Moncure in *Penn v. Whitehead, supra,*" and further, that "the general tenor of *Childress* when read in conjunction with the other authorities, is to the effect that if the business arrangement between husband and wife was one essentially planned and operated for the purpose of cheating the husband's creditors, then the wife must respond to the extent of the value of the husband's services, less the amount necessary for the reasonable support of the husband and his family during the period of the rendition of such services".

In the light of this expression by the District Court we call attention to the decision in *Penn v. Whitehead*, 17 Gratt. (58 Va.) 503, the case chiefly relied upon by the District Court to support its conclusion. In this case a debtor who had failed in business conveyed his property to trustees for the payment of his debts, the property conveyed by the deed being what remained of the assets of certain businesses conducted by a husband and his minor sons, in part with credit obtained by the use of the wife's separate estate. The following ex-

cerpt from the opinion of the Court (beginning on page 526) will demonstrate that the principles established in that case, insofar as material here, were completely overruled in the *Childress* case:

> "It now only remains for me to say what, in my opinion, is to be done with any surplus which may remain of the assets of the two concerns aforesaid after paying their debts and deducting anything that may be due to A. R. Whitehead on account of his fourth of any profits which may possibly have been realized by the concern of 'F. L. Whitehead, agent, & Son.' I think it is a part of the estate of F. L. Whitehead, *quoad* his creditors, and ought to be paid to the appellants in the order of priority in which they obtained their liens by decree and execution. I think that Mrs. Maria P. Whitehead has been fully compensated for the credit of her separate estate, which is all that she contributed to the business, by the support of herself and family derived from it, and by the indemnity secured to her separate estate in the application of the assets to the payment of the debts of the said concern as aforesaid; and that the said surplus, at least, is justly due to her husband, *quoad* his creditors, for the labor and skill of himself and his minor sons, contributed by him to the business. I say *quoad* his creditors, because his agreement that his wife should carry on the trade, though voluntary, would be valid against him, but not against his creditors beyond the extent aforesaid."

It is unnecessary to labor the point further. A comparison of the two cases demonstrates beyond doubt that in the *Childress* case the Supreme Court of Appeals of Virginia completely reversed the principles applied in *Penn v. Whitehead*.

The United States Court of Appeals for the Fourth Circuit, on appeal from the District Court of the United States for the Eastern District of Virginia, adopted the views just expressed, and applied the principles laid down in the *Childress* case, reversing the District Court.

It is respectfully submitted that the District Court misconceived the problem with which it was dealing. If in fact the husband may lawfully donate his services, then the intent with which the donation is made on the one hand, and received on the other, cannot possibly have any significance. The intent in this context is purely subjective and incapable of proof of any sort. The question is whether or not the debtor's labor is an asset subject to the provisions of the two sections of the Virginia Code dealing with fraudulent and voluntary transfers. A transfer by a debtor of an asset, considered as such in the context of the statutes, is void as to an existing creditor, irrespective of intent, for the reason that the Virginia statutes embrace not only fraudulent transfers but also *voluntary* transfers. The debtor's labor is not an asset within the meaning of the Act, as made plain by the citations in the opinion of the District Court from *Glenn, on The Law of Fraudulent Conveyances*, which are here quoted in full:

> "Sec. 139. The Test of an Asset is Its Transferability.
>
> "That being so, the test for the reader is simple. The object of all the proceedings for the enforcement of the creditor's right to realize his debt is to put him in the debtor's place with regard to the particular asset, not for all purposes, but only for gaining satisfaction of the debt. But to put one man in another's place means an assignment or transfer, and when the purpose is limited

to the raising of a sum of money, then that means a sale of the thing and an application of the proceeds, or at least an appraisal and an allocation. It follows that the term, assets available for creditors, refers to things that are capable of transfer or assignment. The creditor can reach only what the debtor can sell, and so he can complain only in the case where the debtor's fraudulent act has taken the form of an alienation of some sort. Of this proposition we have several good illustrations.

Sec. 140. Debtor's Labor Not An Asset for Creditors.

"The first is represented by the statement of general acceptation, that the debtor's labour is not an asset for his creditors, and hence cannot be the subject of a fraudulent conveyance. The debtor, we will say, agrees to work for A. His hire-money, when received, is an asset; so is the debt due him for work performed, although the work itself was of a highly personal nature. But if he should work for nothing, where is the fraudulent transfer of an asset otherwise available to his creditor? True, the person for whom the debtor gratuitously laboured has been enriched, and the effects may be seen in the enhanced value of the property upon which the efforts were expended. But the legislation in which we are interested was never intended to bring creditor and third party into a quasi-contractual relation generally. The inquiry is, what asset, if any, has the debtor transferred to the third party? In the case of gratuitous labor, the answer must be that no asset has passed; therefore the creditor cannot subject the third party, or the latter's property, to any claim under the statutes.

The Alabama case of *Most Worshipful Grand Lodge v. Allen*, 208 Ala. 292, 94 So. 343, 28 A. L. R. 1043, is interesting in this connection. In this case a

creditor of the husband brought suit to subject to the payment of his claim the value of the services of a husband to a corporation of which the wife was the owner of a large portion of the capital stock. The plaintiff alleged that Clarence W. Allen, the husband, for the purpose of avoiding payment of the indebtedness to him and other creditors, arranged with his wife and the corporation to work for the corporation, looking after the interest of his wife, but that, instead of receiving any salary, the benefits of his labor should accrue to his wife by way of dividends from the corporation, in order that his earnings might not be subject to the payment of the debts, and that he would ostensibly depend for his livelihood upon the generosity of his wife; that the intention was that Allen would earn money for the corporation, without salary, so that the dividends of the corporation which would accrue to his wife would, in effect, represent the value of his services, and that his wife would then turn over to him a fair compensation for his services. A demurrer to the bill was sustained, the court holding that a debtor may give his labor or services as a gratuity to another, and when he chooses to do so his creditor cannot subject the proceeds or profits thereof to the satisfaction of his debt, nor in any manner charge the donee therewith. The opinion in this case discusses in detail the Court's reasons upon which it based its conclusions. We quote it in full:

"Somerville, J., delivered the opinion of the court:

"The law does not give to a creditor the right to appropriate the labor or personal services of a debtor for the satisfaction of his debt. From this it results, as is thoroughly well settled by our de-

cisions, that a debtor may give his labor or services as a gratuity to another, and, when he chooses to do so, a creditor cannot subject the proceeds or profits therefrom to the satisfaction of his debt, nor in any way charge the donee therewith. Hoot v. Sorrell, 11 Ala. 386, 407; Stein v. Robertson, 30 Ala. 286, 296; Alexander v. Pollock, 72 Ala. 137; Carter v. Worthington, 82 Ala. 334, 339; 60 Am. Rep. 738, 2 So. 516; Nance v. Nance, 84 Ala. 375, 5 Am. St. Rep. 378, 4 So. 699; Lister v. Vowell, 122 Ala. 264, 25 So. 564.

"The authorities generally are in accord with this view of the law, and the decisions have held with practical unanimity that a debtor may give his personal time, attention, and services to the management and conduct of his wife's business for a series of years, without making the principal invested in or produced by such business, or any part of it, subject to the claims of creditors. Mayers v. Kaiser, 85 Wis. 382, 21 L.R.A. 623, 39 Am. St. Rep. 849, 55 N. W. 688; Wheeler v. Biggs, Miss., 15 So. 118; Martin v. Banks, 89 Ark. 77, 115 S. W. 928; Alsdurf v. Williams, 196 Ill. 244, 63 N. E. 686; Deere, W. & Co. v. Bonne, 108 Iowa, 281, 75 Am. St. Rep. 254, 79 N. W. 59; Phillips v. Hall, 160 Pa. 60, 28 Atl. 502; Trapnell v. Conklyn, 37 W. Va. 244, 38 Am. St. Rep. 30, 16 S. E. 570

"So, also, it is held that the dividends and profits accruing from corporate stock owned by a married woman are not liable for her husband's debts, although they are the result of his successful management of the corporation's business. Taylor v. Wands, 55 N. J. Eq. 491, 62 Am. St. Rep. 818, 37 Atl. 315; Magerstadt v. Schaefer, 213 Ill. 351, 72 N. E. 1063; First Natchez Bank v. Moss, 52 La. Ann. 1524, 28 So. 133.

"Manifestly, such a donation of labor or services presents no analogy to a donation of *property*

which is subject to the claims of creditors, and the rules of law that govern fraudulent conveyances can have no application. Counsel for appellant cite several cases (Pinkston v. McLemore, 31 Ala. 308; Carter V. Worthington, 82 Ala. 334, 60 Am. Rep. 738, 2 So. 516; Bangs v. Edwards, 88 Ala. 382, 6 So. 764) holding that the wife's earnings under the old Married Woman's Law, being the *property* of the husband, could not be given away or transferred by him, except in subordination to the rights of creditors. But those cases do not in any way support appellant's contention here.

"In the instant case, the husband of the respondent Josephine Allen could lawfully render service to the respondent corporation, with the understanding that its value should go to his said wife by way of increased dividends on her shares of corporate stock; and such an arrangement, whatever their intention may have been as to keeping his earnings out of the reach of creditors, was not a fraud on them, because it did not take from them anything which they could appropriate to the satisfaction of their demands. Even a fraudulent intent does not make a lawful gift or transfer unlawful. Fellows v. Lewis, 65 Ala. 343, 39 Am. Rep. 1; Carter Bros. v. Coleman, 84 Ala. 256, 4 So. 151.

"Very clearly, so far as the alleged arrangement for the conversion of Allen's services into dividends to be paid to his wife is concerned, complainant is without remedy. Its contention, however, is that the further allegation of the bill that in making that arrangement the parties intended that Allen should receive from his wife sums of money equal to a fair compensation for his services, and that she has in fact paid over to him large sums of money in that behalf, makes a case of fraud in such sort that equity will declare a lien upon all money so paid over to Allen, in favor of complainant, and charge respondents therewith

No authority is cited by counsel in support of that contention, nor can we conceive of any principle of law or equity upon which it can be soundly rested.

"If Allen rendered service and earned compensation, it was lawful for the corporation to pay for it, either directly to him, or by increased corporate dividends to his wife; and if, in the latter case, his wife chose to pay him for such service, and even agreed in advance to so pay him, out of her increased dividends, it was lawful for her to do so. For neither she nor the corporation was under any legal duty to hold his earnings for the benefit of his creditors, nor to facilitate their appropriation of such earnings to existing debts, in the absence of any interception of them by appropriate legal process. In short, if, by any contractual agreement, either the corporation or his wife was indebted to Allen, the remedy of a creditor was by garnishment, operating only upon compensation due and *unpaid;* and, if there was no obligation on the part of either of them to pay him, his services being in fact by way of gift to either, his creditors are without remedy, so far as such earnings are concerned.

"The theory upon which the equity of the bill is grounded, viz., that complainant had an equitable lien on the money paid to Allen as an indirect compensation for his services, either in the hands of the respondent corporation or of the respondent wife, under the understanding alleged to have existed between them, cannot be sustained on any principle of law or equity, and we hold that the demurrer to the bill for want of equity was properly sustained."

This case is followed, on page 1046 of 28 A. L. R., by an annotation, the introduction to which is as follows:

"ANNOTATION.

"Gift of debtor's services to third person as fraud on creditors.

"I. Scope.

"This annotation does not purport to include such cases as National Bank v. Sprague (1869) 20 N. J. Eq. 13, which deal with the fact that the insolvent husband has gratuitously expended his labor and skill in the conduct or management of a business operated in the name of the wife as a matter of evidence on the question as to whether the business so conducted is a bona fide undertaking of the wife, or merely a scheme designed to defraud the husband's creditors by giving a cover to the debtor's property and enabling him to continue in business, without having his property subjected to the payment of creditors' claims; nor does it purport to include cases where the wife's money is used by the debtor in a business carried on in his own name, or where the debtor commingles his own money or property with that of his wife in a business carried on in his wife's name, in which he gives his services.

"I. In General.

"As will subsequently appear, the great majority of cases are in harmony with the principle as formulated in the cases immediately following that a debtor by giving his labor away has committed no fraud in law or in fact, for by doing so he has not concealed, withheld, or disposed of anything on which his creditors have any claim in law or in equity. Shircliffe v. Casebeer (1904) 122 Iowa, 618, 98 N. W. 486; Winfrey v. Winfrey (1912) 150 Ky. 138, 150 S. W. 42; Eilers v. Conrad (1888) 39 Minn. 243, 12 Am. St. Rep. 641.

39 N. W. 320; Abbey v. Devo (1871) 44 N. Y. 343; Isham v. Shafer (1869) 60 Barb. (N. Y.) 317; Holdship v. Patterson (1838) 7 Watts (Pa.) 547; Raby v. Ross (1892) 14 Ont. Pr. Rep. 440.

"And it is immaterial that the debtor is insolvent. Martinez v. Ward (1882) 19 Fla. 175; Brand v. Bagwell (1910) 133 Ga. 750, 66 S. E. 935; Cooper v. Ham (1875) 49 Ind. 393; Hibbard v. Heckart (1901) 88 Mo. App. 544; Arnold v. Stewart (1898) Rap. Jud. Quebec 17 C. S. 252."

Particular attention is directed to the opening remarks, distinguishing this annotation from a line of cases typified by *National Bank v. Sprague*. It is obvious that here the annotator was referring to the same situation which was under discussion in the *Childress* case, namely, whether or not in the management of the wife's business the husband was in reality conducting a business in which he himself had invested capital, thereby enabling him to defraud his creditors by concealing assets, and it was this point that the Supreme Court of Appeals of Virginia was dealing with in the *Childress* case, in making the comments above quoted, which the District Court lifted out of context and applied in directing the issue to the jury, and in reaching the conclusion which it did.

In arriving at the conclusion that any services of value were rendered to appellant by her husband, the Special Master proceeded altogether on conjecture, largely based upon the fact that the husband actively participated in making contracts for the construction of the houses, and advertised them for sale, referring to himself as having been the designer of the houses. The Special Master found as a fact that no general contractor was engaged, and apparently assumed that

a building could not be constructed without such an intermediary. He found as a fact that general contractors customarily charge 10% of construction cost as their compensation, and on this basis held that the value of the services rendered appellant by her husband was $36,987.47. The Special Master's conclusion was approved and confirmed by the Court, and judgment rendered for this amount, less certain credits allowed to the appellant by way of set off.

If this reasoning is sound, no one can afford to permit another to perform a service for him gratuitously, for should it happen that the person rendering the service is indebted to a third person, the third person could then sue the recipient of the services for the value of the services, and recover on the basis of a value fixed by a court, irrespective of whether or not the services had any value to the recipient.

To state this proposition is sufficient to refute it. No authority was adduced to support it, nor, it is respectfully submitted, could be adduced. There is no such liability known to the law.

CONCLUSION.

The petitioner seeks, by action *in personam*, to charge the wife, *in invitum*, with the value of services rendered by the husband. No precedent is cited to support this contention nor do we believe that any respectable authority can be found for that proposition. In order to come within the terms of the statutes an asset recognized as such by the laws of Virginia must have been transferred. That the debtor's labor is not such an asset was decided by the Supreme Court of Appeals of Virginia in *Childress v. The Fidelity and Casualty Company of New York, supra*, 194 Va. 191, 72 S. E. 2d 349, 35 A. L. R. 2d 1.

It is respectfully submitted that the decision of the United States Court of Appeals for the Fourth Circuit was correct, and that the petition for certiorari should be denied.

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